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In The
Supreme Court Of The United States

October Term 1994

HYUNDAI MOTOR COMPANY, et al.,

Petitioners,

vs.

EVELYN PHILLIP,

Respondent.

On Petition For A Writ Of Certiorari To The District Court of Appeal of Florida, Third District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL COHEN
Grand Bay Plaza, Suite 201
2665 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 859-9099

MARC COOPER
Counsel of Record
MAUREEN E. LEFEBVRE
COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

Counsel for Respondent

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JURISDICTION

Hyundai asks this Court to review a final judgment based on a jury verdict which was affirmed by Florida's Third District Court of Appeal. It claims that this Court has jurisdiction pursuant to 28 U.S.C. § 1257. Hyundai is wrong.

This Court's jurisdiction to review state court judgments is limited. This Court may issue writs of certiorari to review "[f]inal judgments or decrees *rendered by the highest court of a State in which a decision could be had*" on matters of federal law. 28 U.S.C. § 1257(a). However, the final judgment Hyundai asks this Court to review was not rendered by such a court. Consequently, this Court does not have jurisdiction.

The decision here was rendered by Florida's Third District Court of Appeal, an intermediate appellate court. The Florida Supreme Court is the state's highest court. Fla. Const. art. V. Obviously, if further review could have been sought in the Florida Supreme Court, then the Third District's decision was not rendered by the highest court in Florida in which review could be had. Thus, this Court's jurisdiction depends on whether the Florida Supreme Court had jurisdiction to review this decision. If it did, then Hyundai's failure to seek that review precludes jurisdiction here. A long line of precedent demonstrates this Court's unwavering devotion to this basic principle. *E.g.*, *Costarelli v. Massachusetts*, 421 U.S. 193 (1975); *Banks v. California*, 395 U.S. 708 (1969); *McMaster v. Gould*, 276 U.S. 284 (1928); *Matthews v. Huwe*, 269 U.S. 262 (1925); *Stratton v. Stratton*, 239 U.S. 55 (1915); *Mullen v. Western Union Beef Co.*, 173 U.S. 116 (1899); *Fisher v. Carrico*, 122 U.S. 522 (1887). The limitation applies even if the Florida Supreme Court's jurisdiction was purely discretionary; the Florida Supreme Court had to be given the opportunity to exercise that discretion. *E.g.*, *Stratton*, 239 U.S. 55 (Court did not have jurisdiction to review decision of Ohio intermediate appellate court where Ohio Supreme Court had discretion to review decision but petitioner did not seek review).

The Florida Supreme Court's jurisdiction to review decisions

by the district courts of appeal is set out in the Florida Constitution. It may review district court decisions which conflict with decisions of other district courts or the Florida Supreme Court. Fla. Const. art. V, § 3(b)(3); Fla.R.App.P. 9.030(2)(iv). It may also review district court decisions which pass upon questions which the district court certifies to be of great public importance. Fla. Const. art. V, § 3(b)(4); Fla.R.App.P. 9.030(2)(v).

Phillip and Hyundai agree the Florida Supreme Court did not have conflict jurisdiction to review this decision. However, this agreement does not confer jurisdiction on this Court since conflict is not the sole basis for Florida Supreme Court review. Hyundai could have moved the Third District to certify the question as one of great public importance. It did not do so. If the Third District agreed to certify the question, the Florida Supreme Court would have had discretionary jurisdiction under the state constitution and Fla.R.App.P. 9.030(2)(v).[1/]

A party has the right to request certification by the district court. "A motion for . . . certification may be filed within 15 days of an order or within such other time set by the court." Fla.R.App.P. 9.330(a). *See, e.g., Parker v. Leon County*, 601

1/ Hyundai claims that Phillip acknowledged the Florida Supreme Court had no jurisdiction to review the Third District's decision:

> Indeed, in opposing a stay of execution pending Hyundai's efforts to seek review in the Florida Supreme Court or in this Court, plaintiff stated that "[t]he required basis for Florida Supreme Court jurisdiction does not exist. *See* Fla.R.App.P. 9.030(a)(2)."

Hyundai's Petition at 1 n.2. This is a misleading abbreviation of Phillip's argument. Hyundai lifted this quotation out of context from a paragraph which dealt with whether Hyundai could show a likelihood of success in the Florida Supreme Court. Hyundai ignores the two sentences Phillip wrote which precede the quoted sentence: "This Court's decision has not been certified to be one of great public importance; *Hyundai never even moved for such certification*. The required basis for Florida Supreme Court jurisdiction does not exist." Thus, Phillip never conceded that Hyundai had exhausted its state remedies. To the contrary, Phillip pointed out that Hyundai abandoned those remedies. Its abandonment of those remedies is central to this Court's jurisdiction.

So.2d 1223 (Fla. 1st DCA 1992); *Emerald Acres Inv., Inc. v. Bd. of County Comm'rs*, 601 So.2d 577 (Fla. 1st DCA 1992) (both granting motion to certify question to Florida Supreme Court). A district court may deny rehearing but grant the motion for certification. *E.g.*, *Suazo v. Del Busto*, 587 So.2d 480 (Fla. 3d DCA 1991); *Wright v. State*, 585 So.2d 321 (Fla. 5th DCA 1991). Indeed, a party may move for certification without moving for rehearing. *In re The Fla. Bar Rules of App. Pro.*, 529 So.2d 687 (Fla. 1988). A motion for certification may be granted when the issue is one on which the Florida Supreme Court should be given the opportunity to pass, but there is no conflict which would allow the court to take jurisdiction. *Wyche v. State*, 573 So.2d 953, 955 (Fla. 2d DCA 1991).

That is the situation here. The Florida Supreme Court did not have conflict jurisdiction. However, Hyundai had the option of asking to have the question certified. The very lack of conflict indicated that Hyundai should have asked for a certified question if it wanted further review of the case. Hyundai chose not to take advantage of that option. Having failed to seek certification to the Florida Supreme Court, Hyundai cannot claim now that the Third District's decision was "rendered by the highest court of a State in which a decision could be had."

Gotthilf v. Sills, 375 U.S. 79 (1963), is on point. In that case, New York's Appellate Division affirmed a trial court order. The Court of Appeals denied petitioner's motion for leave to appeal because the order was not a final one; it dismissed an appeal as of right on the same ground. However, New York law allowed the petitioner to request the Appellate Division to certify the question to the Court of Appeals; the petitioner failed to take advantage of that right. As a result, this Court held that it could not review the matter because the decision was not from the highest state court in which review could be had.

> Section 589 of the New York Civil Practice Act provides *inter alia* that appeals from nonfinal orders can only be taken to the Court of Appeals by leave of the Appellate Division upon certified questions.

> The petitioner at no time applied to the Appellate Division for such permission. It therefore appears that the Appellate Division, First Judicial Department "was not the last state court in which decision of that [constitutional] question could be had." Gorman v. Washington University, 316 U.S. 98, 100, 62 S.Ct. 962, 963, 83 L.Ed. 1300 (1942). The judgment of the Appellate Division is not that of the "highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257.

375 U.S. at 80.

The same is true here. Fla.R.App.P. 9.330 provides that a party may request the district court to certify a question to the Florida Supreme Court as one of great public importance. Thus, Hyundai had a right to ask the Third District to do so. Hyundai at no time applied to the Third District for such certification. As in *Gotthilf*, "[i]t therefore appears that the [Third District Court of Appeal] 'was not the last state court in which decision of that [federal preemption] question could be had.'"

In *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), this Court reached a different conclusion because, at that time, Florida's appellate rules did not allow *a party* to request certification. 389 U.S. at 237 n.1. Because the rules made no provision for a party to request certification, a party's "suggestion" that certification might be appropriate was a legal nullity. *Id.*

However, Florida's appellate rules have been changed since *Nash* was decided. Those rules now specifically allow a party to ask the district court to certify an issue to the Florida Supreme Court. *Compare* former Fla.R.App.P. 3.14 (1973)(authorizing motions for rehearing) *with* current Fla.R.App.P. 9.330 (replacing rule 3.14 and authorizing motion for certification). *See generally In re The Fla. Bar Rules of App. Pro.*, 529 So.2d at 687 (Rule 9.330(a) and (b) "have been amended to allow a party to move for certification of a question to the Florida Supreme Court based on . . . question of great public importance, without

also having to file a separate motion for rehearing"). Because of the rule change, Florida's present procedure for seeking review by certification to the Florida Supreme Court is like the New York procedure which this Court confronted in *Gotthilf*, rather than the one it confronted in *Nash*. The holding in *Gotthilf*, not *Nash*, controls. This Court has no jurisdiction to review this state court judgment.

STATEMENT OF THE CASE AND FACTS[2/]

Introduction. According to Hyundai, plaintiff claimed Hyundai's seat belt system "was defective because it was equipped with that [sic] 2-point belt system, and not the 3-point belt system plaintiff preferred." Hyundai's Petition at 2. From this premise, Hyundai argues that this case is worthy of review because it is like the pre-*Cipollone* "air bag cases," which held that liability based on a manufacturer's decision to install air bags instead of seat belts was preempted, or the decision in *Myrick*, which held that, after *Cipollone*, liability based on a manufacturer's decision to install regular brakes instead of air brakes was not preempted.

The fact is that Hyundai's characterization of this case, designed to make it appear worthy of review, is wrong. Hyundai was found liable by a state court jury for defectively designing its two-point system, not for choosing to install one federally approved option instead of another federally approved option, i.e., a two-point restraint system instead of a three-point system.

2/ Plaintiff/Respondent Evelyn Phillip, as Personal Representative of the Estate of Ann Marie Phillip, will be referred to as she stands in this Court, as she stood in the trial court and as Phillip. Decedent Ann Marie Phillip will be referred to as "Ann Marie." Defendants/Petitioners Hyundai Motor Company (Korea), Hyundai Motor America ("Hyundai") and Central Hyundai Company, d/b/a Central Hyundai ("Central Hyundai") will be referred to as they stand in this Court, as they stood in the trial court and by name where appropriate.

"R" refers to the state court record on appeal; "T" refers to the trial transcript; "SR" refers to the supplemental record filed with the Third District Court of Appeal. Emphasis is supplied by counsel unless otherwise noted.

The long list of cases cited by Hyundai stand for the proposition that a car manufacturer cannot be held liable merely for choosing one of the general restraint system options allowed by the federal government over another. They do not stand for the proposition that Hyundai may defectively design its chosen option and then escape common law liability. Hyundai, not the federal government, designed Hyundai's two-point system. Thus, Hyundai's liability for Anne Marie's death caused by that defective design is not within the scope of this Court's review in *Myrick* or the cases on preemption cited by Hyundai. To understand this conclusion, a discussion of the facts and evidence is necessary.

Statement of the case. Ann Marie was involved in a routine two-car accident while driving a 1988 Hyundai Excel. Her liver was cut in half by Hyundai's unusual two-point system and she bled to death. By interrogatory verdict, the jury found both that Hyundai's restraint system was defective and that Hyundai and Central Hyundai negligently failed to warn Ann Marie of the dangers of that system even though it had other Hyundai Excel's on its lot with safer restraint systems. Hyundai and Central Hyundai appealed. On appeal, they ignored the jury's findings of both defect and failure to warn. They only challenged the trial court's denial of their pretrial motion for summary judgment based on preemption.[3/] The Third District Court of Appeal

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3/ That summary judgment motion was supported by an affidavit which stated that federal law gave a manufacturer different options for passenger restraint systems; the Excel involved in this case used one of those options--an automatic shoulder belt with no lap belt; and that Hyundai's implementation of that option met the minimum crash test criteria of Federal Motor Vehicle Safety Standard [FMVSS] 208. (R. 247-50). Hyundai's affidavit did *not* say the restraint system was reasonably safe and free of any defect--it did not address defectiveness at all. And, it failed to mention the failure to warn theory at all. Under Florida law, a summary judgment motion which does not address all issues is properly denied. *Zeigler v. Hawkins*, 315 So.2d 200 (Fla. 1st DCA 1975); *Lake v. Konstantinu*, 189 So.2d 171 (Fla. 2d DCA 1966); *Strohm v. Winn-Dixie Stores, Inc.*, 174 So.2d 441 (Fla. 2d DCA 1965).

In opposition, Phillip relied on the deposition of her expert. He said Hyundai's (continued...)

affirmed. It held that Phillip's products liability claims, i.e., that the restraint system in the 1988 Excel was defectively designed and that Central Hyundai failed to warn, were not preempted by the National Highway Traffic Safety Act [the Act].

The accident. Ann Marie bought a 1988 Excel from Central Hyundai in January 1989. (T. 274; 723-24). It had no lap belt, only an automatic shoulder belt which was very stiff or rigid. (T. 443). Hyundai relied on the seat and padding on the lower dashboard to provide the lower body restraint other systems and manufacturers provided with a lap belt. (T. 419-21).

Seven months later, Ann Marie was driving her 1988 Excel. (T. 273, 305-06). She struck an oncoming 1989 Toyota Corolla. (T. 869, 889-90). Both cars were going about 35 m.p.h. (T. 806). There was nothing unusual about this accident, as even Hyundai's expert admitted. (T. 915, 916).

Ann Marie and her front seat passenger wore shoulder belts. The Toyota's driver and front seat passenger wore lap and shoulder belts. None of the rear passengers in either car wore seat belts. Everyone walked away without life-threatening injuries--except Ann Marie.[4/] (T. 506, 928, 932-33, 941). She died from injuries inflicted by her shoulder belt. (T. 1021, 1469).

Emergency surgery revealed that Ann Marie's liver was essentially torn in two; the left lobe was split off from the right.

3/ (...continued)
restraint system was defectively designed. Its overly stiff shoulder belt, combined with its web clamp and lack of pelvic restraint, placed unreasonably high loads on the body's organs and rendered it defective. (SR. 73-78, 85-87, 94-100). Indeed, all persons in a crash like this one should survive if the restraint system is properly designed. (SR. 113).

The trial court denied Hyundai and Central Hyundai's motion for summary judgment. (R. 316). The case was then tried for nine days. Hyundai and Central Hyundai both lost. (T. 1611).

4/ This evidence is in clear contradistinction to Hyundai's statement to this Court at 5 that "Ann Marie was killed in a severe car accident."

The vena cava, the principal vein in the body, was torn; the left hepatic vein was severed. More than four quarts of blood pooled in Ann Marie's abdomen. The surgeons could not save her. (T. 633). She bled to death. (T. 1469).

The autopsy report noted that the liver laceration was due to "blunt force" injury to the abdomen as a result of a car accident. (T. 636). Phillip's expert, an engineer and physician, explained the "blunt force" which killed Anne Marie was the shoulder harness she was wearing: "[T]he blunt force was caused by the diagonal shoulder belt that loaded the left lobe of the liver." (T. 637). The homicide report concurred: Ann Marie's injuries were inflicted *by the shoulder belt.*[5/] (T. 1021, 1469).

Restraint system design. A review of the facts in this case shows that Hyundai's liability, as found by the jury, was based on the defective design of its restraint system, not on its decision to use a two-point system instead of a three-point system.

The first task in designing a restraint system is to restrain the pelvis. (T. 630). Without adequate pelvic restraint, the body slides up, down or sideways; this changes the shoulder belt's position over the torso and shoulder. (T. 424). The belt can slip off the shoulder and chest. If it does, then the 2,000 pounds of force generated in a 30 m.p.h. collision no longer load on the body's strong bones. (T. 448, 630). Rather, the shifted belt can load on the lower ribs; these compress easily because they are not attached to the sternum. Or, it can load on the liver, spleen or bowel, which are unprotected by the ribs; this can rupture or lacerate these organs. (T. 631). From the early 1980's, General Motors warned that using a shoulder belt without adequate pelvic restraint was dangerous. (T. 1252, 1333-34).

The first restraint systems used a lap belt to accomplish the

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5/ Hyundai informs this Court at 7 that the coroner testified that Ann Marie's injuries were caused by the accident forces, not the shoulder belt. Hyundai simply ignores the contrary evidence, including that of the neutral police officer in his homicide report. It also ignores the jury verdict which rejected Hyundai's evidence.

necessary pelvic restraint. See (T. 630). In the 1970's, shoulder belts were added. These direct the load through the strong shoulder, down the very strong spine, to the very strong pelvis. (T. 630). However, if a shoulder belt is too stiff, inertial injuries occur.[6/] If the belt restrains the chest too quickly, the body does not have enough time to absorb the energy. (T. 1094). The system must be designed to prevent the chest and abdomen from slamming into a rigid shoulder strap. (T. 967, 1299-1300).

Another risk of a shifting shoulder belt is "roping"--the edge of the belt curls on itself. (T. 571). As it curls, it may dig into flesh and organs beneath. The rigid chest keeps the belt flat. However, the edge can curl in on the soft abdomen and cut the liver or other unprotected organs. (T. 571, 691). Roping increases the chance and severity of injury. (T. 571, 585).

The liver and spleen "are the most vulnerable organs in the body for belt loading." (T. 632). Part of the left lobe of the liver is totally unprotected; the right lobe is only protected by the less sturdy part of the lower ribs. (T. 631). This vulnerability is why it is so important that the shoulder belt not shift and exert too much pressure in the soft abdominal area. See (T. 632). Even Hyundai's experts agreed that a restraint system which loaded on the abdomen during an accident was a dangerous one. (T. 1031, 1303-04). See (T. 362).

The federal government requires restraint systems to meet minimum performance standards. Federal Motor Vehicle Safety Standard [FMVSS] 208 sets restraint system performance standards in three areas: the head, chest and femur. (T. 376, 1141, 1295-98). It does not establish standards for every aspect of a restraint system's performance. Significantly, it does not estab-

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6/ Inertia is the tendency of a body to continue in motion unless disturbed by an external force. In a 30 m.p.h. collision, the chest organs move ahead at 30 m.p.h. until halted by the chest wall and restraint system. (T. 967, 1299).

lish any standards for impact to the abdomen. (T. 377, 692).[7/]

The Excel's restraint system. The 1988 Excel restraint system had an automatic shoulder harness, but no lap belt. Phillip's engineering expert found the Excel's system defective and unreasonably dangerous. (T. 412). It posed an unreasonable risk of injury or death in collisions at normal speeds. (T. 412). Ann Marie's injuries were caused by three aspects of the Excel's restraint system design: (1) the lack of adequate pelvic restraint; (2) a too-rigid shoulder belt; and (3) a web clamp which made the belt system too "aggressive." (T. 443-44).

Hyundai attempted to control the pelvis with a knee bolster (a padded area on the lower dashboard) and a slightly angled seat reinforced with steel to prevent the occupant's buttocks from plowing through the bottom. (T. 419-21, 533, 538). It directed the restraint load for the lower body to the femur rather than the pelvis. (T. 1095). The system allowed too much lower body movement. The knee bolster let the hips slide forward until the knee hit the bolster. (T. 423, 434, 641-42). Even then, the pelvis continued to move forward. (T. 643).

Because the occupants of a car involved in an accident are thrown in the direction of the impact, the knee bolster system allows even greater lower body movement when, as here, the accident is not a head-on collision. (T. 640). Here, Ann Marie's knees moved 45° to 60° right; they had farther to go before hitting the knee bolster than if moving straight ahead. (T. 640, 642). This allowed the shoulder belt to shift from loading safely to the shoulder and spine to loading directly on the abdo-

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7/ FMVSS 208 sets minimum standards. Reasonable engineering standards may require more. (T. 446, 560). A system with a belt that stretches from one side of the car to the other might meet FMVSS 208's standards; it might also strangle the user. (T. 448, 524). Even Thomas, Hyundai's engineering expert, admitted that FMVSS 208 does not give the whole picture. He has seen crash tests where all of FMVSS 208's performance standards were met but the dummy flew through the windshield. (T. 1302). Thus, even he acknowledged that meeting FMVSS 208's performance standards is the start, not the end, in designing a reasonably safe occupant restraint system. (T. 560).

men and liver area. (T. 436, 635, 642-43).

Another expert explained the effect of Hyundai's restraint system on Ann Marie. After the collision, Ann Marie's pelvis began moving off the seat, forward and to the right. (T. 641). The shoulder belt shifted; it tried to restrain her by loading over her lower rib cage. (T. 642). This did not restrain her pelvis, which continued to move. (T. 643). Her knees had a long way to travel before hitting the bolster because she was moving obliquely right. Even when her knees hit the bolster, her pelvis kept moving forward and right, along with her spine and right lobe of the liver. (T. 642, 643). Simultaneously, the shoulder belt continued to compress the liver's left lobe. (T. 643). It was probably roping moderately. (T. 691-92). As the torso continued to move to the right, the force applied by the belt opened up the liver. In the process, it tore off the liver's left hepatic vein and ruptured the inferior vena cava. (T. 643).

In addition to inadequate pelvic restraint, Phillip's expert identified a second defect in the restraint system: the shoulder harness itself. Hyundai suggested it simply "borrowed" an already proven system designed by Volkswagen.[8/] It ignored the differences between the systems. Hyundai altered the seat and knee bolster. More importantly, the stiffer shoulder strap and use of a "web clamp" made Hyundai's system dangerously different. See (T. 1098-99).

Shoulder belts are designed to stretch when fully loaded in an accident; the greater the stretch, the longer the body has to absorb the energy. (T. 823-34, 1094). The 1988 Excel's shoulder harness was rigid--"just in and of itself there is not enough energy absorption in the shoulder harness, it is very stiff." (T. 443). It stretched too little--only 4.5%. (T. 444, 577). By

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8/ Volkswagen originally developed this "no lap belt" system in the 1970's and used it in the 1975 Rabbit. (T. 364, 1074, 1153). However, the 1988 Excel system was not a faithful copy of Volkswagen's two-point system, which it allegedly copied. See (T. 444). The knee bolster, seat and shoulder harness were all different. (T. 1098-99).

contrast, Volkswagen's two-point "shoulder belt-only" system which Hyundai "copied" stretched 20%. (T. 444).

Hyundai also used a web clamp. The shoulder belt pulls out of a retractor. The web clamp is a device in the retractor that locks the belt in an accident and prevents the release of excess webbing. (T. 444, 528-32). Volkswagen did not use one in its "shoulder belt-only" system. (T. 1098). A web clamp may be fine with a belt that stretches more than Hyundai's. (T. 581). But Hyundai's combination of a belt with a low stretch factor and a web clamp "makes it a very aggressive belt." (T. 579). Very simply, the web clamp accentuated the problems caused by the rigid shoulder belt. See (T. 581).

The expert analyzed films of Hyundai's crash tests. (T. 432). They show Hyundai's shoulder harness did not work well with the knee bolster. The shoulder belt on the dummy acted as it had on Ann Marie. The dummy's hips moved forward and the shoulder belt took all the load. It slipped under the rib cage and into the abdomen. The sequence of photos shows the shoulder strap pressing progressively further into the abdomen, with the load primarily underneath the rib cage and around the dummy's side. (T. 436-37). This means the shoulder belt loaded over the driver's liver. (T. 437). The films show at least moderate roping in this area. (T. 436). All this could be seen by someone experienced in film analysis, crash tests and restraint systems, but Hyundai's engineers saw none of it.[9/] (T. 432-33, 585).

Significantly, the federal regulations on which Hyundai relies for preemption merely said that Hyundai could use a two-point

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9/ One explanation for Hyundai's use of such a dangerous system was lack of experience. Crash testing and evaluating automobile restraint systems and their effect on people is the province of biomechanical engineering. (T. 624-25). Hyundai employed *no* biomechanical engineers when it designed and tested the 1988 Excel. (T. 330, 345, 624). The engineer in charge of testing this system had no academic or practical experience. (T. 324). He admitted he "was just a greenhorn, just two years in the company and not in a position to conduct research or investigation" when he was put in charge of the crash testing. (T. 387).

system. Those regulations did not tell Hyundai how to safely design that design. Because proper design was not mandated by the government but left to Hyundai, the jury's decision that Hyundai's design was defective is not only supported by abundant evidence, but is also not preempted.

Failure to warn. Phillip alleged not only that the seatbelt system was defectively designed, but also that Hyundai and Central Hyundai failed to inform Ann Marie about other seatbelt systems which were available in Hyundai's Excels and which had safer seatbelt systems. Significantly, this failure-to-warn claim was grounded in unique facts. When Ann Marie went to Central Hyundai in January 1989 to buy a car, it had various 1988 and 1989 Excels on its lot from which Ann Marie could choose. (T. 723-24, 730). The restraint systems on all the cars were *not* the same. Hyundai had three different restraint systems in its Excels: 1988 models with two-point automatic shoulder belts and no lap belt; 1988 and 1989 models with conventional three-point shoulder and lap belts; and 1989 models with two-point automatic shoulder belts plus a lap belt.

In the 1989 Excels, all of which had a lap belt, the owner's manual and driver's sun visor warned about dangers in not using the manual lap belt. Hyundai's visor clearly stated:

IMPORTANT SAFETY INFORMATION:

> For full restraint protection, THE MANUAL LAP BELT AND THE AUTOMATIC SHOULDER BELT MUST BE SECURELY FASTENED whenever the car is moving.

(T. 592, 1240; Pl.Ex. 28). Hyundai's visor also noted: "Failure to follow these instructions could increase the chance and/or severity of injury in an accident." *Id.*

Thus, when Ann Marie bought her Excel, Central Hyundai knew the pelvic restraint offered by its seat/knee bolster was inadequate. It knew that restraint systems with a lap belt--available in some 1988 and 1989 Excels--were safer than the shoulder belt-only system in the 1988 Excel Ann Marie purchased. But

Central Hyundai never passed this information on to Ann Marie. Because Central Hyundai did not tell Ann Marie of the restraint system differences between the various 1988 and 1989 Excel models, Ann Marie had no opportunity to make an educated decision as to which car and which restraint system she wanted.

The jury properly found liability based on this failure to warn. Because the federal regulations do not address the issue of warnings at all, this liability, like Hyundai's liability for defective design, is not preempted.

WHY CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument. In its attempt to gain certiorari review by this Court, Hyundai has mischaracterized the claims against it. Hyundai suggests that certiorari is appropriate because this case involves preemption under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* [the Act], and the administrative regulations promulgated thereunder [FMVSS]. Hyundai notes that this Court accepted jurisdiction in *Freightliner Corp. v. Myrick*, Case No. 94-286 (Oct. 7, 1994), to consider the preemptive scope of the Act, and suggests *Myrick* will be dispositive here. Hyundai also suggests that, regardless of *Myrick*, this Court should review this case because FMVSS 208 and the Act immunize it from tort liability for utilizing a defective two-point restraint system. Neither suggestion is accurate. Regardless of whether the Act expressly or impliedly preempts conflicting tort claims, Hyundai's liability here does not conflict with FMVSS 208 and therefore is not preempted.

To create its preemption argument, Hyundai asserts at 5 that it was found liable because its vehicle "was defective because it was equipped with that [sic] 2-point belt system, and not the 3-point belt system plaintiff preferred." Hyundai is wrong. Hyundai was found liable for defectively designing its two-point system, not for choosing to install one federally approved option instead of another federally approved option, i.e., a two-point restraint system instead of a three-point system.

While some cases hold that a car manufacturer cannot be

liable for choosing one type of federally approved restraint option instead of another (i.e., airbags instead of belts; regular brakes instead of anti-lock brakes), neither the federal regulations nor the cases construing them allow a manufacturer to defectively design the restraint option chosen. Hyundai, not the federal government, designed Hyundai's particular two-point system. Although the federal regulations allowed Hyundai to use a two-point system, they did not tell Hyundai how to design it. The regulations do not specify the degree of rigidity of the shoulder belt or its other characteristics; they do not mandate the use of web clamps; they do not specify the existence or degree of seat ramping; they do not specify the existence, placement, or characteristics of a knee bolster.

Here, Hyundai was found liable, not for using a two-point system, but for designing a defective one. The two-point system Hyundai used was defective--the shoulder belt was too stiff, a web clamp was inappropriate and the pelvic restraint was inadequate. As a result, the system allowed too much roping and placed too great a load on the abdomen. Thus, there is no preemption because the issue before the jury in this case--whether Hyundai properly designed its two-point system--is outside the scope of the federal regulations.

Moreover, *Myrick* does not address the defective design of a permissible option; it involves the issue of liability based solely on the use of one federally approved option (regular brakes) instead of another (anti-lock brakes). Thus, this Court's decision in *Myrick* will not determine Hyundai's liability here.

Finally, preemption must be applied on a claim by claim basis. Here, Phillip claimed both failure to warn and design defect. Under the unique facts of this case, a jury could easily conclude Central Hyundai had a duty to inform Ann Marie about the choices in restraint system options and about the availability of Hyundai Excels on the very same lot with better restraint systems. Because the federal regulations do not address the issue of warnings at all, there is no conflict and therefore no preemption.

In sum, even if this Court were to hold that FMVSS 208

allows auto manufacturers the freedom to choose a two-point system, that holding would not address the issue here. It would not insulate Hyundai from liability for designing the defective restraint system involved in this case.

The Act. Hyundai bases its preemption claim on the Act. The Act contains a limited preemption provision:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or such item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). This preemption clause does not stand alone. It is molded both by the Act's purpose and by a savings clause that protects common law causes of action against the manufacturer from preemption. Both apply here.

The clear purpose of the Act was to increase the safety of automobile occupants in car accidents. That purpose was clearly expressed by Congress within the confines of the Act itself. The Act's opening section states:

> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.

15 U.S.C. § 1381. This Court has acknowledged that this is the Act's true purpose. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32-33 (1983).

To achieve this goal, the Act authorized the administrative promulgation of safety standards. These standards do *not* replace common law standards of care. Section 1397(k)(formerly § 1397(c)) unequivocally provides:

> Compliance with any Federal Motor Vehicle Safety Standard issued under this Chapter *does not exempt any person from any liability under common law.*

The legislative history makes the same point. The Senate report addressed the Act's effect on state law. It concluded:

> Moreover, the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards *would thus not necessarily shield any person from product liability at common law.*

S. Rep. No. 1301, 89th Cong., 2d Sess. at 2710 (1966). The House report also notes the savings clause is intended to ensure

> [t]hat compliance with safety standards *is not to be a defense or otherwise to effect the rights of parties under common law*, particularly those relating to warranty, contract and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. at 24 (1966).[10/]

> [T]hese expressions of legislative purpose should govern our assessment of the preemptive effect of the Act and the standards issued under it.

Chrysler Corp. v. Tofany, 419 F.2d 499, 508 (2d Cir. 1969). In

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10/ Courts consistently reject the auto industry's assertion that the Act's real purpose is uniform regulation, not safety. "[Uniformity] is a goal only insofar as it promotes safety. Uniformity is not a goal in and of itself; nor is uniformity a goal of the Safety Act so that vehicle equipment manufacturers might avoid tort liability." *Welsh v. Century Products*, 745 F.Supp. 313, 319 (D.Md. 1990). *See also Garrett v. Ford Motor Co.*, 684 F.Supp. 407, 409 (D.Md. 1987)("Congress intended the Act to save the lives of automobile passengers through safety standards; not the dollars of automobile manufacturers through uniformity"); *Gingold v. Audi-NSU-Auto Union*, 567 A.2d 312, 329-30 (Pa.Super.Ct. 1989). Uniformity cannot "take precedence over Congress' primary goal of safety." *Buzzard v. Roadrunner Trucking Co.*, 966 F.2d 777, 783 (3d Cir. 1992)("strict uniformity may even interfere with the safety goal, thus frustrating the Act's purpose").

other words, the federal motor vehicle safety standards are *minimum* standards. They set a floor for automotive safety, not a ceiling. By their very terms, compliance does not relieve the manufacturer of common law liability. *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983).

Hyundai claims that FMVSS 208 is an exception to these rules because it allows a manufacturer to choose among three different types of systems. Even if FMVSS 208 allows a manufacturer to choose any of the general alternatives listed there without being subjected to tort liability, that exception does not apply here. Hyundai is not liable because it chose one alternative over another; Hyundai is liable because it defectively designed its two-point system. Any exception for FMVSS 208 which Hyundai suggests exists simply does not encompass this action.

A. FMVSS 208 does not authorize defective design of a restraint system.

Introduction. A jury found that Hyundai's restraint system was defectively designed. Hyundai did not challenge the sufficiency of the evidence to support that factual finding in its appeal. Thus, the simple legal issue which was before the Third District and which is before this Court is whether the Act and FMVSS 208 allow Hyundai to design and install an admittedly defective and unreasonably dangerous two-point restraint system and then hide behind the fact that two-point systems are generally authorized. That issue was properly decided adversely to Hyundai; it does not merit further review here.

FMVSS 208. FMVSS 208 authorizes a manufacturer to use either an automatic two-point system, an automatic three-point system or airbags. Congress and its regulatory agencies did not try to design or approve all such systems. To the contrary, the government allowed manufacturers to choose between these general types of systems and relied on the manufacturers to design them safely. With respect to design, the government merely set minimum safety standards that each option must meet. The safety standards for restraint systems involve the head, chest and femur. There is no safety standard for abdominal loading.

Importantly, Congress specifically stated that compliance with these minimum safety standards *does not* insulate a manufacturer from common law liability. Even if some actions are preempted, claims based on an authorized option's defective design are not. Simply put, the federal standards do not shield a manufacturer from liability when it uses a defective two-point system, a defective three-point system or a defective airbag system.

Hyundai installed a defectively designed restraint system in the 1988 Excel which caused Ann Marie's injury rather than prevented it. Phillip's experts identified three defects: (1) inadequate pelvic restraint; (2) a too-stiff shoulder harness; and (3) a web clamp which made the system too "aggressive." The restraint system consisted of a single shoulder strap which, together with the knee bolster, did not adequately confine the pelvis. The shoulder belt was stiff; a web clamp made it more rigid. Because the pelvis was unconfined, the shoulder belt could load 2,000 pounds of force on the abdomen in a collision.

Hyundai cites numerous cases in support of its preemption claim. Almost all relate to the issue of whether a manufacturer may be held liable solely because it failed to install airbags. They recognize that Congress allowed options in lieu of mandatory airbags; liability predicated only on a manufacturer's exercise of the very choice Congress granted would be improper.[11/]

These "airbag" cases do not apply here. Phillip does not claim that Hyundai should have chosen airbags, or some other authorized system, as its safety restraint option. Instead, she claimed that once Hyundai chose a "shoulder belt-only" system, it had a duty to design a system that was not unreasonably dangerous to the user. Under § 1397(k), that duty is enforceable in

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11/ In the typical airbag case, the plaintiff was not wearing his seatbelt. Thus, he could not claim the seatbelt system was defective. He could only claim the manufacturer should have used an automatic system like an airbag. Courts hold such claims are preempted because federal law allows seatbelts instead of airbags and states cannot eliminate a choice expressly allowed by federal law.

a common law action.

Hyundai blurs the difference between these two liability theories. However, the distinction is critical. In one, a plaintiff attempts to hold a manufacturer liable for choosing one general type of restraint system authorized by FMVSS 208 over another authorized system. In the other, a plaintiff attempts to hold a manufacturer liable for defectively designing the particular type of restraint system chosen. Both *Myrick* and Hyundai address the first situation; they do not address the second.[12/] Yet, the second situation is the issue in this case.

The distinction between liability based on choosing an approved system and liability based on improper design of that system is not novel or particularly controversial. *Wood v. Gen. Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), and *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), are airbag cases which found preemption. However, both recognized that preemption does not encompass defective design of an approved option. *Wood* discussed § 1392(d), the "preemption" clause:

> We, of course, do not imply that section 1392(d)'s prohibition immunizes the manufacturer from liability for *defective design of an airbag*.

865 F.2d at 402 n.10.

Perry v. Mercedes Benz, 957 F.2d 1257 (5th Cir. 1992), is on point. Perry drove her car into a ditch. Her airbag did not inflate on impact. She claimed the airbag was defectively designed because the force required to trigger its deployment was too high. The restraint system Mercedes Benz used--airbags--was one of the general types approved by FMVSS 208. The system also met the government's minimum safety standards. As a

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12/ Hyundai cites a few cases which consider whether the failure to install a lap belt, in itself, is a design defect. They utilize the same reasoning as the "no airbag" cases and hold that the mere failure to install a lap belt is not an actionable design defect. They *do not* suggest that a manufacturer may defectively design that "no lap belt" system.

result, Mercedes Benz argued, like Hyundai here, that Perry's claim was preempted. The Fifth Circuit disagreed.

The court analyzed the "no-airbag" cases, the same cases on which Hyundai relies. It acknowledged that some courts have found preemption in such cases because

> the tort claims sought to impose liability on the manufacturer for choosing an option that the federal scheme expressly granted them the right to choose.

957 F.2d at 1264. However, *Perry* concluded that these were not controlling; the issue was not the same. The issue in *Perry* was the manufacturer's defective design of the chosen system and not the decision to install one type of system rather than another. As *Perry* recognized, common law liability is, at best, preempted only when the claim is based *solely* on the manufacturer's choice of one alternative allowed by FMVSS 208 over another; preemption is *not* a factor when the claim is based on the manufacturer's defective design of the alternative it has chosen.

Specifically, *Perry* found no preemption of a claim that the chosen restraint system was defectively designed because

> [l]iability for the defective design of an air bag system would not necessarily conflict with the objectives of the Safety Act or the methods that have been chosen to fulfill those objectives.

957 F.2d at 1265. *Perry* then concluded:

> [E]ven if we assume that allowing liability for a manufacturer's failure to install an air bag would conflict with Congress' chosen method by removing or requiring one of the manufacturer's choices, Perry's claim presents a different scenario. Once the manufacturer chooses an option that includes an airbag system, Standard 208 S5-S6 merely set forth *minimum* performance requirements for that system. *To allow tort liability for the design of that system would not remove or require any particular choice,*

> *or otherwise frustrate the "flexibility" that the federal scheme provides*. We recognize that the manufacturer who chooses to meet only the bare minimum performance requirements will be burdened with the potential for tort liability, but this is the exact burden that Congress preserved in the Savings Clause, when it stated that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law."

Id. (footnote omitted; emphasis by court).

The same is true here. Once Hyundai chose the option of a shoulder belt without a lap belt, the regulations merely set forth *minimum* performance requirements for that system.[13/] To allow tort liability for the design of that system does not remove one of the federally approved options. It merely holds Hyundai responsible for its defective implementation of the option it chose. Preemption is simply not a factor in this situation.

Hyundai nowhere suggests that *Perry* was wrongly decided.[14/] Indeed, Hyundai ignores the fact that the Third District relied on *Perry*, not just *Myrick*, to support its holding that the Act did not preempt Phillip's common law claims. This selective blindness, however, does not change the fact that *Perry* distinguishes between preemption for simply choosing an allowed option and no preemption for defective design of that option. Indeed, that was the only point for which Phillip cited *Perry* in

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13/ The cases cited by Hyundai do not suggest that a car manufacturer is insulated from liability simply because its system meets the minimum standards for head, chest and femur loads; nor do they do not hold that, because the minimum standards only address head, chest and femur loads, Hyundai had no duty to design its system to provide for safe abdomen loads.

14/ Hyundai's sole reference to *Perry* is in a footnote where it makes the cursory claim that *Perry* is "an off-point case." Hyundai's Petition at 7 n.5. It may be "off-point" for Hyundai's purposes. However, it is directly "on-point" to the facts and liability theories at issue here.

her Third District brief. The Third District's citation to *Perry* recognizes this distinction and implicitly holds that Phillip's claims fall on the "no preemption" side.

The distinction drawn by the Fifth Circuit in *Perry*, and acknowledged by the First Circuit in *Wood* and the Third Circuit in *Pokorny*, is common sense. Suppose Hyundai designed a lap belt with knife-sharp edges which cut into the user during an accident. Obviously, Hyundai would not be insulated from liability simply because the manual belt was part of a restraint system whose general type was acceptable and which met minimum performance standards for head, chest and femur compression. Or, suppose that Hyundai designed an airbag which clung to the user's face on deployment and smothered him. Hyundai would not be insulated from liability simply because an airbag is an acceptable type of system. Yet, that is exactly what Hyundai argues here. It claims it may design a restraint system, which can itself kill the user, and elude liability simply because the system is of a type generally approved under FMVSS 208 and meets minimum head, chest and femur force standards.

FMVSS 208 allows a manufacturer to choose a two-point system; it does not mandate any particular two-point system. It certainly does not set out the design details of that system. Although FMVSS 208 may immunize a manufacturer from state tort liability for simply choosing to use a non-defective two-point system, it does not immunize a manufacturer from state tort liability for designing a defective one.

The Myrick case. The Third District cited *Myrick v. Fruehauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), to support its holding that Phillip's claims against Hyundai were not preempted. This Court has accepted jurisdiction to review *Myrick*. From this, Hyundai concludes that this Court's decision in *Myrick* will be controlling here. Hyundai's argument is misguided. *Myrick* does not address defective design of an approved system. Thus, regardless of how this Court decides *Myrick*, this

action will not be affected.[15/]

Myrick is factually similar to the airbag cases. In *Myrick*, the defendants are two truck manufacturers who did not install anti-lock brakes on their trucks. The applicable federal safety standard allowed truck manufacturers to choose whether to install anti-lock brakes or to use regular brakes instead; the defendants chose not to install anti-lock brakes.

In other words, the issue in *Myrick*, like the airbag cases, is whether the Act preempts common law actions based solely on the manufacturers' choice of an equipment option which is specifically allowed by federal safety standards. Even if this Court decides that the Act preempts such liability, that decision would not address the issue here. Hyundai is not liable because it chose a two-point system; Hyundai is liable because it designed and installed a fatally defective two-point system. Hyundai's reliance on *Myrick* is fueled by Hyundai's consistent disregard of the difference between liability for choosing one of several authorized options, which may be preempted, and liability for the defective implementation of that choice, which is not.

In sum, Hyundai chose to install a system without a lap belt. Although that choice was permissible under the federal standards, Hyundai still had a common law duty to design its system so as to safely implement that choice. It had a duty not to design a system where, because of lack of adequate pelvic restraint, the shoulder belt could shift and load 2,000 pounds of collision force onto the user's abdomen and liver. It had a duty to design a shoulder belt which was not so extraordinarily stiff as to cause its

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15/ The Third District's citation to *Myrick* as well as to *Perry* indicates that it had alternative independent bases for its holding that the claims against Hyundai were not preempted. The citation to *Myrick* suggests that it agreed that, under the rationale of *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), the Act did not impliedly preempt the claims. Its citation to *Perry* indicates that it also agreed that claims based on the defective design of an authorized option were not preempted. Because Hyundai does not attack the *Perry* alternative, a decision in *Myrick*, even if contrary to the Eleventh Circuit's decision, will not insulate Hyundai from liability.

user fatal injuries in a collision. It had a duty not to use a web clamp which accentuated the injury producing potential of the shoulder belt. In short, it had a duty to design a shoulder belt-only system whose parts functioned together to protect, not kill, the user. Its failure to do so subjects it to liability. That liability is not preempted by the Act.

B. FMVSS 208 does not regulate the aspect of performance at issue here.

Hyundai's preemption argument is inapplicable to this case for another reason as well. The federal regulations do not address abdominal loading; a defect relating to abdominal loading is therefore not preempted.

Hyundai relies on the following language in the Act:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or such item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). Thus, by its own terms, the Act only preempts a conflicting state safety standard if two conditions are met. First, the state standard must apply to the same "item of motor vehicle equipment" as the federal standard. Second, the state standard established for that item of equipment must apply "to the same aspect of performance" as the federal standard. *See Chrysler Corp. v. Tofany*, 419 F.2d 499, 506 (2d Cir. 1969). Both requirements must be met.

The "aspect of performance" at issue in this lawsuit is abdominal loading. Ann Marie died because Hyundai's restraint system allowed the force from the collision to be transmitted to and exerted against the abdomen instead of the shoulder, spine or pelvis. But, FMVSS 208 only sets safety standards for three

aspects of a restraint system's performance: the forces which may be placed on the head, chest and femur during a certain type of crash test. FMVSS 208 does not regulate performance vis-a-vis abdominal forces; it is silent on that matter. Even Hyundai admitted there was no federal standard for this aspect of its restraint system's performance. (T. 349, 363, 377).

If there is no federal standard on a particular aspect of performance, there is no preemption under 15 U.S.C. § 1392(d). Hyundai cannot rely on federal standards which are silent as to an aspect of performance to preclude liability. Any other conclusion ignores the plain terms of the statute.

Interpretation of a statute must begin with its language. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, "only the most extraordinary showing of contrary intentions" of congressional intent "would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984)(citations omitted). When the terms of a statute are unambiguous, "judicial inquiry is complete, except in rare and exceptional circumstances." *Id.* at 75 (citations omitted).

The language in § 1392(d) on the scope of preemption vis-a-vis aspect of performance is unambiguous. It must be given effect according to its plain meaning. Consequently, this action is not preempted because it does not involve the same aspect of performance which is addressed by the federal safety standards.

Other rules of statutory construction lead to the same result. The lower courts have consistently held that the phrase "same aspect of performance" should be narrowly read to promote the purposes of the Act. *Pokorny*, 902 F.2d at 1126; *Wood*, 865 F.2d at 418; *Tofany*, 419 F.2d at 510; *Jordan v. Paccar, Inc.*, 792 F.Supp. 545, 550 (N.D.Ohio 1992). A broad reading is inconsistent with the Act's purpose and savings clause. *See Tofany*, 419 F.2d at 509-10; *Jordan*, 792 F.Supp. at 550.

A broad reading is also inconsistent with general preemption principles announced by this Court. The starting place for preemption analysis is the precept that federal preemption is not favored. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617-18 (1992). Courts start "with the assumption that the historic police powers of the States are not to be superseded by [a] Federal Act unless that is the clear and manifest purpose of Congress." *Id.* at 2617 (citations, quotation marks and ellipses omitted); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). This is especially true when the subject is of traditional state concern, like tort remedies for personal injuries. *See Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947); *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 823 (11th Cir. 1989); *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 318-19 (Pa.Super.Ct. 1989). Application of these principles mandates that preemption provisions should be narrowly construed. *See Cipollone*, 112 S.Ct. at 2618.

Whether viewed as a matter of the plain terms of 15 U.S.C. § 1392(d), or whether viewed as a matter of statutory construction and federalism, the result is the same. Hyundai remains tortiously liable for the defective design of its restraint system vis-a-vis abdominal loading because that aspect of its restraint system's performance is not the subject of a federal standard. Simply put, Hyundai cannot design a restraint system which meets minimum requirements for head, chest and femur loading but which nevertheless causes serious injuries to other parts of the body not covered by any federal standards and then seek to avoid liability under the guise of preemption. Thus, Hyundai's common law liability is not preempted by the Act.

C. At the least, the failure to warn claims against Hyundai and Central Hyundai were not preempted.

Phillip's claims against Hyundai were not limited to design defects. To the contrary, through interrogatory verdict the jury specifically found a negligent failure to warn in addition to defective design. (T. 1611). Hyundai's motion for summary judg-

ment, the denial of which was the only issue it raised on appeal, never addressed this claim; it did *not* argue that the failure to warn claims were preempted. Yet, that claim makes certiorari inappropriate here.

Federal preemption is a scalpel, not a bludgeon. It must be used precisely and narrowly. It requires a claim by claim analysis of the causes of action. The fact that one claim is preempted does not mean that all are. *Cipollone*, 112 S.Ct. at 2621-25. Here, even if the design defect claim is preempted, the failure to warn claim is not.

There are two general ways in which state law claims are preempted. If Congress evidences an intent to occupy the entire field, then state laws within that field are preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There is no suggestion here that Congress intended to wholly occupy the field of automotive safety to the exclusion of the states. Indeed, the savings clause in 15 U.S.C. § 1397(k) evidences the opposite intent since it saves state common law actions.

State law may also be displaced if the state law actually conflicts with the federal law. This means that a state law may not be enforced if it: (1) is impossible for a manufacturer to comply with both the state and the federal law; or (2) obstructs the achievement of the full purposes and objectives of Congress. *Silkwood*, 464 U.S. at 248. Neither of these reasons for preemption exist here either.

Tnere is no actual conflict between a state tort claim imposing a duty to warn and FMVSS 208. In fact, the Act and FMVSS 208 are completely silent on the issue of warnings. It is not impossible to comply with FMVSS 208 as well as with state law requirements on warnings. As a result, there is no preemption because of actual conflict.

Moreover, imposing a duty to warn does not impede Congress' objectives under the Act. The explicit and announced purpose of Congress in passing the Act was to improve automobile occupant safety. 15 U.S.C. § 1381. Imposing a duty to

warn does not obstruct this goal.

In short, there is no preemption of the duty to warn. FMVSS 208 addresses equipment performance requirements. At best, it preempts state regulations that establish standards "applicable to the same aspect of performance of such vehicle or such items of equipment." Enforcing a duty to warn does not establish contrary standards; neither does it frustrate the Act's purpose. As a result, the state claim is not preempted. *See Richards v. Michelin Tire Corp.*, 786 F.Supp. 959 (S.D.Ala. 1992)(Act does not preempt claim based on duty to warn of tire/rim mismatching).

Hyundai makes no reference in its petition to the failure to warn claims. Hyundai simply fails to address this Court's analysis in *Cipollone* which distinguished between claims based on failure to warn and other claims in the case.

Cipollone involved the Cigarette Labeling and Advertising Act which mandated that specific warnings be put on packs of cigarettes. The Act had a preemption clause which provided that no other warnings shall be required on the package or in advertising. This Court addressed the scope of federal preemption of common law tort claims against the cigarette manufacturer. It held that duty to warn claims based on allegations that the manufacturer should have included additional or clearer warnings were preempted. However, failure to warn claims based on the manufacturer's testing or research practices were *not* preempted. Claims for breach of express warranty, fraudulent misrepresentation and conspiracy also were *not* preempted. Thus, *Cipollone* held that warning claims were preempted only to the extent they fell within the statute. Other claims were not preempted.

In *Cipollone*, the federal legislation addressed warnings and nothing else. Thus, only warning claims were preempted. Claims which were not addressed by the federal legislation were not preempted. Here, the federal legislation does not say anything about warnings. Those claims are not preempted.

There is no conflict between the restraint systems suggested

by FMVSS 208 and imposing a duty to warn a customer that the manufacturer's shoulder and lap belt system is safer than that manufacturer's shoulder belt-only system, or that the same model is available with a lap belt. Moreover, establishing such a duty is not detrimental to the safety goals of the Act. Hyundai and Central Hyundai could easily have met both requirements, with no detriment to the safety of automobile occupants. A duty to warn simply requires Hyundai and Central Hyundai to notify the buyer of her alternatives. Because there is no conflict between this common law duty to warn and FMVSS 208, there is no pre-emption of this claim.

CONCLUSION

This is not a case where Hyundai was found liable for choosing one federally approved option instead of another. To the contrary, the jury specifically found Hyundai liable because it defectively designed the chosen option and because it negligently failed to warn about the availability of its cars with different restraint systems. Thus, although the question Hyundai presents is interesting and perhaps important, it is not a basis for certiorari review in this case. Certiorari should be denied.

Respectfully submitted,

MICHAEL COHEN
Grand Bay Plaza, Suite 201
2665 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 859-9099

MARC COOPER
Counsel of Record
MAUREEN E. LEFEBVRE
COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

Counsel for Respondent